

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	Case No.: ARB-12-1820
	*	
TOWN OF HULL	*	Date Issued:
	*	
and	*	September 3, 2014
	*	
AFSCME, COUNCIL 93	*	
	*	

Arbitrator:
Nicholas Chalupa, Esq.

Appearances:
James B. Lampke, Esq. - Representing the Town of Hull
Michael Downey, Esq. - Representing AFSCME, Council 93

The parties were provided 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 the following:

AWARD

The Town of Hull did not violate the parties' collective bargaining agreement when it appointed Christopher Gardner to the position of Working Foreman. The grievance is denied.

Nicholas Chalupa, Esq.
Arbitrator
September 3, 2014

INTRODUCTION

On April 30, 2012, AFSCME, Council 93 (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 Nicholas Chalupa (Arbitrator) to act as a single neutral arbitrator with the full power of the Department. I conducted a hearing at the Town Hall in Hull, Massachusetts on May 12, 2014, and directed the parties to submit post-hearing briefs by June 30, 2014. On June 27, 2014, the parties requested an extension of the deadline to file briefs to July 14, 2014. On July 13, 2014, the parties requested a second extension until July 18, 2014. On July 16, 2014, the Town of Hull (Town) filed its brief with the Department, and on July 17, 2014, the Union filed its brief.

THE ISSUES

The parties did not agree on a stipulated issue.

Union proposal:

Did the Town act within its rights when it appointed Chris Gardner to the vacant Working Foreman position on or about March 16, 2012?

Town proposal:

- 1) Is the grievance arbitrable?
- 2) If so, did the Town act within its rights under the contract and law when it appointed Christopher Gardner to the position of Working Foreman?
- 3) If not, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

- 1) Is the Union's grievance arbitrable?
- 2) If so, did the Town violate the parties' collective bargaining agreement for the period of July 1, 2011 to June 30, 2014 (the Agreement) when it appointed Christopher Gardner to the position of Working Foreman?
- 3) If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Agreement contains the following pertinent provisions:

Article V: GRIEVANCE AND ARBITRATION PROCEDURE

A grievance shall mean a specific violation of one or more provisions of the agreement and shall be settled in the following manner:

Step 1

The Union Steward and/or representative, with or without the aggrieved employee, shall take up the grievance or dispute in writing with the employee's immediate supervisor within five (5) working days of the date on the grievance or his knowledge of its occurrence. The supervisor shall attempt to adjust the matter and shall respond to the Steward within five (5) working days.

Step 2

If the grievance still remains unadjusted, it shall be presented to the Town Manager, in writing, within five (5) working days after the response of the immediate supervisor is due. The Town Manager shall respond, in writing, within eleven (11) working days.

Step 3

If the grievance is still unsettled, either party may, within fifteen (15) days after

the reply of the Town Manager is due, by written notice to the other, request arbitration.

The arbitration proceeding shall be conducted by an arbitrator to be selected by the Employer and the Union within seven (7) working days after notice has been given. If the parties fail to select an arbitrator, the Massachusetts Board of Conciliation and Arbitration shall be requested by either of both parties to provide a panel of five (5) arbitrators. Both the Employer and the Union shall have the right to strike two (2) names from the panel. The party requesting arbitration shall strike the first name; the other party shall then strike one name. The process will be repeated and the remaining person shall be the Arbitrator.

The decision of the Arbitrator shall be final and binding on the parties and the Arbitrator shall be requested to issue his decision within thirty (30) days after the conclusion of testimony and argument.

The expense for the Arbitrator's services and the proceedings shall be born equally by the Employer and the Union. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, providing it pays for the record. Grievances involving disciplinary action shall be processed beginning at the third (3) step. If the case reaches arbitration, the Arbitrator shall have the power to direct a resolution of the grievance up to and including restoration to the job with all compensation, and privileges that would have been due the employees.

Nothing contained herein, shall be construed so as to authorize any Arbitrator to alter or modify this agreement.

All grievances will be held as confidential by all parties to the agreement until such time as the Town Manager responds to the Union, to the extent where permitted

by law.

Article VII: SENIORITY

The length of continuous full-time service of the employee in the Department of Public Works/Highway Department shall determine the seniority of the employees.

The principle of seniority shall govern and control in all cases of promotion, within the bargaining unit, transfer, decrease, or increase of the working force as well as preference in assignment to shift work and choice of vacation period.

Article VIII: JOB POSTING AND BIDDING

When a position covered by this agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications. This notice shall remain posted for a seven (7) day period. Employees interested shall apply in writing within the seven (7) day period. Within five (5) days of expiration of the posting period the employer will award the position to the most senior applicant qualified.

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.

If it is mutually agreed between the parties that no applicant is qualified, the employer may [fill] the position from outside the bargaining unit.

It is agreed that the above language shall not apply to the Senior Clerk or Working Foreman positions, which shall be awarded solely on the basis of qualifications and experience as determined by the Town Manager and DPW Director.

STIPULATED FACTS

1. Michael White was originally hired in 1989; David Freeland (Freeland) was originally hired in 2000 and Christopher Gardner (Gardner) was originally hired in 2006.
2. The Temporary Working Foreman position was posted in August 2010 and the temporary appointment was made in the same month.
3. The permanent Working Foreman position was posted in December of 2011 and the appointment was made in March of 2012.
4. The grievance was timely filed.
5. The (second) permanent Working Foreman position was posted in July of 2013 and the appointment was made in August of 2013.

FINDINGS OF FACT

Prior to August 2010, Robert White held the single Working Foreman position.¹ Robert White was frequently absent and Director Joseph Stigliani (Stigliani) performed his duties with the occasional assistance of Michael White and Gardner. In August 2010, the Town decided to hire a Temporary Working Foreman. The Town posted the position and three employees applied: Gardner, Michael White and John Papasodero (Papasodero). Michael White withdrew his name from consideration for the position of Temporary Working Foreman. Papasodero did not possess the required qualifications. In August 2010, the Town appointed Gardner to the Temporary Working Foreman position.

During Gardner's tenure as Temporary Working Foreman, the Town Manager

¹ Robert White and Michael White are not related.

Philip Lemnios (Lemnios) and Stigliani observed his performance. The Town received positive feedback from Town residents concerning Gardner's performance as Temporary Working Foreman and was particularly impressed with Gardner's initiative and efforts to improve the DPW's productivity.

The Town decided to add a second permanent Working Foreman position and posted the position in December 2011. Seven employees applied for the permanent Working Foreman position. Two applicants did not meet the required qualifications. The Town interviewed the five remaining applicants including Gardner, Michael White and Freeland.

Article VIII of the parties' collective bargaining agreement for the period of July 1, 2009-June 30, 2011, does not specifically exclude the Working Foreman position from the provision requiring the Town to award a vacant position to the most senior applicant qualified. The parties agreed in bargaining for a successor agreement to specifically exclude the position of Working Foreman from Article VIII's requirement that the Town appoint the most senior applicant qualified. Article VIII of the parties' collective bargaining agreement for the period of July 1, 2011 – June 30, 2014 specifically excludes the position of Working Foreman from the requirement that the Town appoint the most senior applicant qualified and adds that the Town may award the position "solely on the basis of qualifications and experience as determined by the Town Manager and DPW Director."

On January 9, 2012, Stigliani recommended Gardner and Michael White to Lemnios for the position of Working Foreman. Michael White was the most senior applicant qualified. On March 26, 2012, the Town appointed Gardner to the permanent

position of Working Foreman.

On March 26, 2012, the Union presented the grievance at Step 1 to Stigliani. On April 2, 2012, Stigliani denied the grievance. On April 18, 2012, Lemnios denied the grievance at Step 2. On April 30, 2012, the Union filed a petition for grievance arbitration with the Department.

Robert White retired from the Working Foreman position in 2013. Six employees applied for the second Working Foreman position including Michael White and Freeland. Stigliani recommended Michael White. In August 2013, the Town appointed Michael White to the second Working Foreman position.

POSITIONS OF THE PARTIES

The Union

I. Arbitrability

The presumption of arbitrability applies here because the contract contains a broad arbitration clause that provides for arbitration of any “specific violation[s] of one or more provisions of the agreement.” Therefore, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. Steelworkers v. Warrior & Gulf Navigation Co. (Steelworkers), 363 U.S. 574, 584-585 (1960). The Agreement does not contain language expressly excluding the present dispute from arbitration, nor does the evidence show a purpose to exclude it.

II. Merits

At the time of Gardner’s appointment to Working Foreman, Michael White had been a Town DPW employee for 23 years and Freeland for 12 years. Gardner had only been with the Town DPW for six years. All three men possessed the same requisite

qualifications for the position, which included a High School Diploma, five years of experience in construction, a valid Massachusetts Class A CDL, and a valid Massachusetts Hoisting License.

Lemnios testified that a large reason for ultimately choosing Gardner was his performance as Temporary Working Foreman. However, Lemnios did not place the importance on the supervisory responsibilities Michael White and Freeland assumed during their careers. Michael White and Freeland supervised “beach crews” during the summer season. When assigned to these crews, both Michael White and Freeland were responsible for assigning duties to the workers each morning and making sure that the assigned work was completed throughout the day. Although the supervision extended over seasonal employees, considering the economic importance of the Town’s beaches during the summer season, it would be inappropriate to discount this supervisory experience. In fact, the Working Foreman job description lists “seasonal/community service employees” under the positions supervisory responsibilities. In addition, Michael White frequently filled in when the Working Foreman was absent. Clearly, Michael White and Freeland were qualified for the permanent Working Foreman position.

In addition, Article VIII does not trump Article VII. A written instrument is to be construed as a whole by interpreting the meaning of a questioned word, or part, with regard to the context in which it is used, the subject matter and its relation to all other parts or provisions. Article VII states that “the principle of seniority shall govern and control in all cases of promotion within the bargaining unit.”

Michael White and Freeland possessed the necessary qualifications for the position, possessed the same if not more experience than Gardner, and served as

employees for the Town for a substantially longer period of time than Gardner. The Town should have appointed Michael White and Freeland to the Working Foreman position before Gardner.

The remedy in this case requires unique treatment. In August 2013, Michael White was awarded an identically paid Working Foreman position and was thus elevated to the position he seeks in the present case. As a remedy, the Union requests Michael White be compensated for all lost wages between March 26, 2012 and August 5, 2013. As for Freeland, he shall be placed in the Working Foreman's position currently held by Gardner, and shall receive all lost wages between August 5, 2013 to the present.

The Employer

I. Arbitrability

A grievance is defined in the contract as "a specific violation of one or more provisions of the agreement." It is a well-recognized principle of arbitration law that "arbitration is a matter of contract and a [party] cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986) quoting Steelworkers, 363 U.S. at 582. The Union has failed to cite a specific provision of the contract that requires the Town to award the Working Foreman position to the most senior qualified applicant. Therefore, the Arbitrator should dismiss the grievance as the claim is not arbitrable.

II. Merits

Under the operative language of the contract, the Town had the clear and unambiguous right to determine the best selection for the position of Working Foreman,

and the Town properly exercised its right to do so. Article VIII, Job Posting and Bidding states that when a position becomes vacant, the Town shall post the vacancy for 7 days and within 5 days of the expiration of the posting period “the employer will award the position to the most senior applicant qualified.” However, the parties agreed to include the following paragraph in the 2012-2014 contract: “It is agreed that the above language shall not apply to the Senior Clerk or Working Foreman positions, which shall be awarded solely on the basis of qualifications and experience as determined by the Town Manager and DPW Director.”

In addition, the Town’s actions were in accordance with its residual or reserved management rights. Management rights, as clearly retained in the Agreement, provide clear and unambiguous authority for the Town to act as it did. The Agreement does not contain language expressly limiting the the Town’s right to appoint a Working Foreman, and the parties bargained to include the specific language concerning the appointment of the Working Foreman in the Agreement.

The evidence shows that the Town Manager and DPW Director made a determination to appoint Gardner to the Working Foreman position after considering the qualifications and experience of all applicants, including Michael White and Freeland. Therefore, the grievance should be denied.

OPINION

Arbitrability

At the outset, the Town raised a question of substantive arbitrability, claiming that the Union failed to “make out a case that there has been a violation of any specific provision of the contract.”

The three questions in a determination of substantive arbitrability are whether there is an agreement to arbitrate, whether the subject of the grievance has been specifically excluded from that agreement, and whether there is other forceful evidence that the parties intended that the subject in question should not be arbitrated. A.T. & T. Technologies v. Communications Workers of America (A.T. & T.), 475 U.S. 643, 648-651 (1986).

The Agreement does not contain language specifically excluding the subject of the Town's appointment of a Working Foreman from arbitration. Furthermore, the record contains no other evidence showing that the parties agreed that all claims concerning the Town's appointment of a Working Foreman would not be arbitrable. Absent any language in the contract expressly excluding such claims from the grievance-arbitration procedure or other evidence of mutually agreed upon exclusion, I find that the grievance is substantively arbitrable.

Merits

The issue before me is did the Town violate the parties' collective bargaining agreement for the period of July 1, 2011 to June 30, 2014 (the Agreement) when it appointed Christopher Gardner to the position of Working Foreman. For the reasons stated below, I find that the Town did not violate the Agreement.

I find no ambiguity in Article VIII of the Agreement. Article VIII states that the Town must award vacant positions to the most senior applicant qualified. However, the final paragraph of Article VIII specifically excludes the Working Foreman position from the rest of Article VIII, stating that the Town may choose a Working Foreman "solely on the basis of qualifications and experience as determined by the Town Manager and

DPW Director.” As the Union points out, Article VII states that “seniority shall govern in all cases of promotion within the bargaining unit,” but it is a well-established rule of contract interpretation that general provisions are restricted by more specific provisions. See generally, Marlin M. Volz & Edward P. Goggin, Elkouri & Elkouri: How Arbitration Works, 498-499 (5th Ed., 1997).

The Union argued that even beyond Michael White and Freeland’s additional years of service, the Town should have given more weight to their work experience such as supervising the seasonal “beach crews.” The Union admits that Gardner was qualified and held the required experience for the position of Working Foreman. Article VIII gives the Town Manager and DPW Director the discretion to weigh qualifications and experience as they see fit and ignore seniority if they so choose.

For all the above reasons stated, I find that the Town did not violate the Agreement by appointing Gardner to the Working Foreman position over Michael White and Freeland.

Award

The Town of Hull did not violate the parties’ collective bargaining agreement when it appointed Christopher Gardner to the position of Working Foreman. The grievance is denied.

Nicholas Chalupa, Esq.
Arbitrator
September 3, 2014